No. 89-951

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,

v.

MARY VIRGINIA OXENDINE,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONER

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In her Opposition, respondent contends that certiorari should be denied for two reasons. First, she says that because no "federal interest" is present, this Court has no jurisdiction under 28 U.S.C. § 1257(a) to review the case. Opposition ("Opp.") 4. Second, she contends that because the District of Columbia need not have provided for appellate review at all, the D.C. Court of Appeals is free to "manage" appeals any way it chooses—including, as here, by "substitut[ing] its own factual findings for those of its trial courts, . . . creat[ing] a new standard requiring opposing counsel to detect perjury at trial, or refus[ing] to consider recent changes in law . . . ." Opp.

5. All such matters, respondent argues, are "solely for the state court" to resolve, and "[t]his Court is not about to tell another court system how to conduct its managerial affairs . . . ." *Id.*

Respondent is mistaken about this Court's certiorari authority over the D.C. Court of Appeals. She is also mistaken to suggest that nothing more than unreviewable "managerial" details are presented here.

1. It is true that the issues in this case must arise "under the Constitution or . . . statutes of . . . the United States" in order to trigger this Court's jurisdiction. 28 U.S.C. § 1257(a). Contrary to petitioner's contention, however, the issues presented here meet that requirement for two separate reasons.

a. First, as petitioner specifically argued below, the Court of Appeals' announcement of a new rule requiring petitioner's counsel to have detected all perjury at trial or be barred from ever attacking it, and its refusal to entertain changes in law occurring since its previous decision, violated petitioner's right to constitutional Due Process.[1] Indeed, this Court's decisions concerning the claims petitioner has raised recognize the constitutional dimension of the questions raised by those claims. *See, e.g., Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (fundamental fairness dictates that "appellate court *must* apply the law in effect at the time it renders its decision") (emphasis supplied) (quoting *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969)); *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238, 246 (1944) ("preserva-

[1] Petitioner raised its Due Process argument in its rehearing petition (at p. 5); this was petitioner's first opportunity to do so because the Court of Appeals' new rule condoning perjury and its complete refusal even to consider the change in law affecting Bendectin were both announced for the first time in the decision and judgment here under review.

tion of the integrity of the judicial process" and "the administration of justice" cannot always depend on "the diligence of litigants" to uncover deception and fraud); *see also Evitts* v. *Lucey*, 469 U.S. 387, 404 (1985) ("arbitrary" judicial decision that imposes different responsibilities on similarly situated parties "violate[s] due process principles").

b. Second, and again contrary to respondent's view, there is a *federal statute* at issue in this case, and its proper construction and implementation *is* a matter within the jurisdiction of this Court. The D.C. Court of Appeals was created not by a state legislature but by the Congress of the United States, pursuant to its power to legislate for the District of Columbia. U.S. Const. art. I, § 8, cl. 17. That court's authority and responsibility was established by Congress in the 1970 Court Reform Act, D.C. Code § 11-102.

Petitioner denies that Congress intended the D.C. Court of Appeals to have the unfettered "managerial" authority to do what it did here—*i.e.*, substitute its own fact-findings for that of the D.C. trial courts, fashion a rule insulating perjury from appellate review, and refuse to entertain significant changes in law. More importantly, we submit that the question whether the court indeed has that authority is itself a *federal* question within this Court's jurisdiction. As this Court has consistently held regarding its unique authority over the D.C. Court of Appeals, "Congressional Acts directed toward the District, *like other federal laws*, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute." *Pernell* v. *Southall Realty Co.*, 416 U.S. 363, 368-69 (1974) (emphasis supplied). *Accord Whalen* v. *United States*, 445 U.S. 684, 687-88 (1980).

2. Addressing the merits of the questions we have presented, respondent relies again on her contention that because the District of Columbia need not have provided appellate review at all, the way in which it manages appeals cannot present an important federal question for this Court. She also makes three other points about the merits, all of which are wrong.

a. As we have shown, our Due Process claims and the proper implementation of the Court Reform Act are both federal matters. Moreover, while it is true that appellate review need not have been afforded, once Congress afforded it the Court of Appeals was of course bound to follow Due Process in "managing" that appellate review.[2] Furthermore, where, as here, the District of Columbia has adopted for itself the federal rule entitling parties to a new trial on the basis of perjury (Rule 60), the proper construction of that rule becomes a matter of national consequence that merits this Court's review.[3]

b. In an effort to suggest that the questions we have raised are not fairly presented, respondent makes three remaining points. First, she says that the Court of Appeals' first decision in this case—holding that the scien-

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[2] *See Evitts* v. *Lucey*, 469 U.S. 387, 400-01 (1985); *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972).

[3] *See, e.g., Miller* v. *United States*, 357 U.S. 301, 306 (1958) (finding review warranted where rule developed by District of Columbia courts is "substantially identical" to federal statute that "is not confined in operation to the District of Columbia"); *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935) (finding review of D.C. statute warranted where it adopts provisions of federal statute and is therefore not "confined in its operation to the District of Columbia").

Moreover, inasmuch as the District of Columbia Court of Appeals falls within the parameters of the federal court system, this Court may in any event review this action under its supervisory authority over the administration of justice in the federal courts. *See, e.g., McNabb* v. *United States*, 318 U.S. 332, 341 (1943) (citing *Nardone* v. *United States*, 308 U.S. 338, 341-42 (1939)); *see also Gay* v. *United States*, 411 U.S. 974, 975-76 (1973) (Douglas, J., dissenting).

tific evidence presented was sufficient to prove respondent's case—is not properly before this Court. Opp. 1. That is not correct. At the time the Court of Appeals denied rehearing from its first decision (*Oxendine I*), that court had already authorized the Rule 60(b) proceedings now before this Court. Because those proceedings were then continuing in the trial court, *Oxendine I* did not constitute a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Only when the Court of Appeals finally resolved liability in *Oxendine II* was there a reviewable "final judgment" from that court;[4] accordingly, the present petition is petitioner's first opportunity to bring *Oxendine I* before this Court.

c. Next, petitioner says there has been no "change in the law" that the Court of Appeals should have considered in *Oxendine II*. Opp. 6 n.4. This is simply a refusal to acknowledge what happened after *Oxendine I* was decided. After that case came down, every single appellate court addressing the matter—including three

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[4] Unlike the situation when the merits of the case were still pending in the Rule 60(b) proceedings, all that now remains to be resolved in the lower courts is respondent's claim for punitive damages. In such circumstances—when the highest state court's resolution of the merits of a case is complete—this Court has found jurisdiction present under § 1257. *See, e.g., Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2438 n.11 (1988) (ruling of Mississippi Supreme Court that state administrative proceedings were not preempted by federal law deemed "final judgment" notwithstanding remand to conduct such proceedings); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (ruling of Mississippi Supreme Court on merits of issues concerning liability deemed "final judgment" notwithstanding remand for recomputation of damages); *see also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-85 (1975) (describing four categories of cases in which this Court has treated decision on federal issue as final without awaiting completion of additional proceedings in lower state courts); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 128-33 (6th ed. 1986) (discussing finality under § 1257 when further proceedings are contemplated).

federal appellate courts[5]—has held that the available scientific evidence is insufficient as a matter of law to prove that Benedectin causes birth defects. Only in the local District of Columbia courts—and only because the District of Columbia Court of Appeals has refused even to address the issue—is the prevailing law to the contrary.

d. Finally, respondent contends that the Court of Appeals "found that *there was no perjury*" in this case at all. Opp. 3 (emphasis in original). That is simply not so. Putting to one side whether the Court of Appeals would have had authority to "find" that there was *no* perjury when the trial court found Dr. Done's pivotal testimony so replete with perjury and "so deliberately false that *all* his testimony on behalf of [respondent] is suspect,"[6] the truth is that the Court of Appeals did *not* hold that there was no perjury. Rather, that court "found" that nearly all the perjury was "discoverable prior to trial" by petitioner's counsel and for that reason "cannot form a proper basis for granting" a new trial. App. 9a. *That* is the holding below. It is true that the court also added—improperly in our view—that its "reading of the record differs substantially" from the trial court's regarding the perjury; but the court expressly stated that "we do not base our decision on this ground." App. 10a. Rather, as stated, its decision was premised on its unprecedented, unsupported pronouncement that petitioner's counsel—but not respondent's own counsel—failed in their duty to prevent the perjury from occurring and that, accordingly, a verdict premised on such perjury must stand.

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[5] *Brock* v. *Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307, *opinion modified on petition for reh'g*, 884 F.2d 166, *reh'g en banc denied*, 884 F.2d 167 (5th Cir. 1989); *Richardson* v. *Richardson-Merrell Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S.Ct. 218 (1989); *Lynch* v. *Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987).

[6] App. 36 (emphasis in original).

CONCLUSION

For the foregoing reasons, and those stated in our petition, the writ of certiorari should be granted.

Respectfully submitted,

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